

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROM GAS, INC.	:	DETERMINATION
	:	DTA NO. 809565
for Review of a Determination or for Refund	:	
of Motor Fuel Tax under Article 12-A of the	:	
Tax Law for the Period June 1, 1983 through	:	
August 31, 1988.	:	

Petitioner Rom Gas, Inc., c/o Leonard R. Rosenblatt, Esq., 130 East 35th Street, New York, New York 10016 filed a petition for review of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the period June 1, 1983 through August 31, 1988.

On January 10, 1992, petitioner, appearing by Leonard R. Rosenblatt, Esq., filed a motion for summary determination herein. On January 31, 1992, the Division of Taxation, appearing by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel), moved in opposition to petitioner's motion and also cross-moved for summary determination denying the petition and sustaining the assessment. Petitioner filed a reply affirmation on February 10, 1992. After due consideration of the record, Robert F. Mulligan, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is liable to a penalty for failure to file a return or pay tax on diesel fuel where the tax was paid late, but prior to the issuance of a notice of determination.

FINDINGS OF FACT

Petitioner, Rom Gas, Inc., operated a retail service station at 436 10th Avenue, New York, New York during the period at issue.

Petitioner started selling diesel fuel in February 1982, but did not register to sell diesel fuel until May 1986.

In June 1986, petitioner started filing monthly returns and paying tax on diesel fuel. On

its returns, petitioner overreported gallonage to "catch up" for the unreported fuel sold during the period February 1982 through May 1986. Overpayments were made without any direction to the Division of Taxation ("Division") as to the application thereof.

Upon audit, the Division verified gallonage by information obtained from petitioner's suppliers, Amoco Oil Company, City Utilities, Inc. and MNG Petroleum, Inc. Audited gallonage and taxes due computed for the period February 1982 through September 1988 were as follows:

Audited gallonage	3,002,797
Tax rate	<u>.10</u>
Audited taxes	\$300,279.70
Less: reported taxes	<u>253,804.00</u>
Additional taxes due	\$ 46,475.70

The overpayments of tax which began in June 1986 were applied by the Division to the tax due for the earliest months of the audit period, with the result that taxes due for all quarters to and including May 1985 were paid. Also, penalty and interest credits were calculated for the overpayments and applied to the penalty and interest which had accrued from the quarters ending February 1982 through February 1983.

On May 24, 1989, the auditor issued a Proposed Audit Adjustment of Tax Due under Article 12-A of the Tax Law for the period February 1, 1982 through August 31, 1988 showing tax due of \$46,475.70, interest of \$28,503.07 and penalty of \$49,512.59, for a total of \$124,491.36.

By check dated September 1, 1989, petitioner paid the tax and interest, a total of \$74,978.77. Petitioner did not pay the \$49,512.59 in penalty.

On January 29, 1990, the Division issued a Notice of Determination to petitioner for the unpaid penalty of \$49,512.59. The computation summary attached to the Notice of

Determination showed the following breakdown of "[a]dditional tax, penalty and interest":

"Tax Period Ended	Tax Amount <u>Assessed</u>	(+) Interest Amount <u>Assessed</u>	(+) Penalty Amount <u>Assessed</u>	(-) Assessment Payments/ Credits	(=) Current Balance Due
08-31-83	0.00	1,114.14	5,515.45	1,114.14	5,515.45
11-30-83	0.00	1,672.40	8,391.59	1,672.40	8,391.59

05-31-84	0.00	1,450.04	2,912.57	1,450.04	2,912.57
08-31-84	0.00	1,450.04	2,771.64	1,450.04	2,771.64
11-30-84	0.00	1,450.04	2,630.71	1,450.04	2,630.71
02-28-85	0.00	5,701.54	6,355.71	5,701.54	6,355.71
05-31-85	0.00	4,746.44	7,003.71	4,746.44	7,003.71
08-31-85	7,932.30	2,277.27	2,379.69	10,209.57	2,379.69
11-30-85	15,639.00	3,792.46	4,691.70	19,431.46	4,691.70
02-28-86	17,468.00	3,808.02	5,240.40	21,276.02	5,240.40
05-31-86	5,353.40	1,038.02	1,606.02	6,391.42	1,606.02
07-31-88	12.00	0.44	2.04	12.44	2.04
08-31-88	<u>71.00</u>	<u>2.22</u>	<u>11.36</u>	<u>73.22</u>	<u>11.36</u>
TOTALS	46,475.70	28,503.07	49,512.59	74,978.77	49,512.59"

SUMMARY OF THE PARTIES' POSITIONS

Petitioner essentially claims that no penalty should be imposed for the quarters ending August 31, 1983 through May 31, 1985, because the amount of the tax assessed for said quarters was "zero", due to the method used by the Division of Taxation in crediting the overpayments.¹ As an alternate argument, petitioner claims that in no event should any penalty exceed the minimum of \$100.00 per quarter.

The Division counters that the penalty was triggered by the failure to timely file the return and pay the tax, not by the determination of additional tax by the Division.

CONCLUSIONS OF LAW

A. During the period June 1, 1983 through May 31, 1985, Tax Law former § 289-b(1) provided as follows:

"Penalties.--1. A distributor who or which fails to file a return or to pay any tax within the time required by or pursuant to this article shall thereby forfeit to the state a penalty of five per centum of the amount of tax determined to be due as provided in this article plus one per centum of such amount for each month of delay or fraction thereof after the expiration of the first month after such return was required to be filed or such tax became due; but the tax commission, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be determined, assessed, collected and paid in the same manner as the taxes imposed by this article and shall be disposed of as hereinafter provided with respect to moneys derived from the tax. Unpaid penalties

¹The original petition was based only on reasonable cause. The amended petition added this claim, which is the basis for petitioner's motion. Since the additional claim is applicable only for the period June 1, 1983 through May 31, 1985, the motion was characterized as a motion for partial summary determination.

under this subdivision shall be recovered by the attorney-general by action in the name of the people, and all penalties due from the same distributor may be sued for in one action."

By Laws of 1985 (ch 44, § 13), effective June 1, 1985, the above provision was revised, changing the penalty to 10 per cent of the tax determined to be due plus 1 per cent for each month or fraction thereof, not exceeding 30 per cent in the aggregate. The amended statute (Tax Law § 289-b[1][a]) also stated as follows:

"Provided, however, in the case of a failure to file such return within sixty days of the date prescribed for filing of such return by or pursuant to this article (determined with regard to any extension of time for filing), the penalty imposed by this paragraph shall not be less than the lesser of one hundred dollars or one hundred per centum of the amount required to be shown as tax on such return. For the purpose of the preceding sentence, the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return."

B. Tax Law § 284.1 provides, in pertinent part, as follows:

"All tax for the period for which a return is required to be filed shall be due on the date limited for the filing of the return for such period, regardless of whether a return is filed by such distributor as required by this article or whether the return which is filed correctly shows the amount of tax due."

It is noted that while Tax Law § 284.1 specifically refers to motor fuel, it also is applicable to diesel motor fuel by virtue of Tax Law § 282-a.

C. During the period June 1, 1983 through May 31, 1985, Tax Law former § 288 provided, in pertinent part, as follows:

"Determination of tax.--If a distributor files a return under this article, but such return is incorrect or insufficient, the state tax commission shall determine the amount of tax due at any time within three years after the return was filed (whether or not such return was filed on or after the due date), and give written notice of such determination to the distributor, except that if such distributor has not registered as required by this article, or fails to file a return or files a wilfully false or fraudulent return with intent to evade the tax, such determination may be made at any time."

While this provision was recodified by Laws of 1985 (ch 44, § 11), effective June 1, 1985, the essence thereof was retained in Tax Law § 288(1)(a) and (2).

D. Petitioner's position that since no tax was specified in the Notice of Determination for

the quarters ending August 31, 1983 through May 31, 1985, there was nothing upon which to base the penalty, is without merit.

The tax for each period was due on the date limited for the filing of the return pursuant to Tax Law § 284. The fact that petitioner was given credit for the late payments in the Notice of Determination does not mean that no tax was determined for those quarters. By recognizing the payments, the Division actually determined that the taxes had been owed and had been paid prior to the issuance of the Proposed Audit Adjustment. The only things that remained for the Division to assess were the additional tax, interest and penalty. It is noted that the computation section attached to the Notice of Determination specifies that the computation reflects the "additional" tax due.

Tax Law § 289(b)(1) must be read in conjunction with the other provisions of Article 12-A. It is clear that the Legislature intended that the returns be timely filed and the tax be timely paid. The penalty, in fact, increases at the rate of 1% for each month of delay. A distributor should not be permitted to abrogate its responsibility and to evade penalty by paying tax many months late but prior to assessment. Petitioner was fully cognizant of taxes owed and the application of the overpayments and was not misled in any respect.

Petitioner's alternative argument, that the maximum possible penalty would be \$100.00, is also without merit. The relevant provision, which was effective June 1, 1985, a date which is subsequent to the quarters for which the penalty at issue was imposed (quarters ending August 31, 1983 through May 31, 1985) is, in any event, pertinent only with respect to returns which are no more than 60 days late.

Since petitioner has not shown that its delay was excusable, the penalty will not be remitted.

E. Petitioner's motion for summary determination is denied. The Division's cross-motion for summary determination is granted and the petition of Rom Gas, Inc. is denied and the Notice

of Determination issued February 8, 1990 is sustained.

DATED: Troy, New York
October 29, 1992

/s/ Robert F. Mulligan
ADMINISTRATIVE LAW JUDGE